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No. 92-384

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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT L. CASH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a corporation's withholding tax liability is satisfied when (i) the Internal Revenue Service levies on corporate accounts receivable that have a face value greater than or equal to the unpaid withholding taxes, (ii) the Service does not immediately sell the receivables and (iii) the Service ultimately collects from the receivables an amount less than the unpaid withholding taxes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A34) is reported at 961 F.2d 562. The order entered by the district court (Pet. App. A35-A36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1992. The petition for a writ of certiorari was filed on August 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. LTS Optical, Inc. (LTS) withheld social security and income taxes from the wages of its employees in the amount of $243,263.50 for the fourth quarter of 1984, the first and fourth quarters of 1985, and the first and second quarters of 1986. LTS paid over to the United States, however, only a small portion of the amount withheld (Pet. App. A9). In an effort to collect the unpaid withholding taxes ($150,005.95), the Internal Revenue Service levied upon certain accounts receivable of LTS. These accounts receivable were in the face amount of $200,000. As checks from the account debtors were received, the Service applied the payments toward satisfaction of LTS's tax liability. Pet. App. A10.

After all credits were given, $84,000 of LTS's withholding taxes remained unpaid. The Service then assessed petitioners as "responsible persons" for the unpaid balance under 26 U.S.C. 6672.[1] The Service credited income tax refunds due petitioners Robert and Evelyn Cash from later years against their respective Section 6672 liabilities. Pet. App. A10. The Cashes brought this suit for refund in district court. The United States counterclaimed for the remaining taxes due and joined petitioner Randall Block in the action. Petitioners contended (i) that they were not responsible persons who

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[1] When net wages are paid to employees, the withheld taxes are credited to the employees even if the employer thereafter fails to remit the withheld taxes to the United States. To prevent a loss of revenue, Section 6672 of the Code provides that "[a]ny person required to collect, truthfully account for, and pay over any tax" who willfully fails to do so shall be liable for a penalty equal to the total amount of the tax not paid over. 26 U.S.C. 6672. See *United States* v. *Sotelo*, 436 U.S. 268 (1978).

willfully failed to pay over the withheld taxes and (ii) that they were entitled to a credit against their liability in an amount equal to the face amount of the LTS accounts receivable on the date of the Service's levy. Pet. App. A10-A11.

2. The jury found that petitioners were responsible for LTS's failure to pay the withholding taxes of LTS's employees.[2] The district court rejected petitioners' claim that, since the face amount of the accounts receivable the government obtained by levy exceeded LTS's withholding tax liability, the corporation's liability (and consequently petitioners' liability as responsible persons) should be deemed paid in full. Pet. App. A13-A14. The district court denied that motion, holding that "the Internal [R]evenue Service has already collected all of the available corporate accounts receivable and has properly applied all credits to the corporate * * * liability of LTS Optical, Inc." (Pet. App. A35-A36).

3. Petitioners' sole contention on appeal was that the withholding taxes should have been deemed paid upon the levy by the Internal Revenue Service of the accounts receivable of LTS. They therefore claimed that they were not liable for any penalties under Section 6672. Relying on *United States* v. *Barlow's, Inc.* (*In re Barlow's Inc.*), 767 F.2d 1098 (4th Cir. 1985), aff'g 53 Bankr. 986 (E. D. Va. 1984), aff'g 36 Bankr. 826 (Bankr. E. D. Va. 1984), and *United States* v. *Pittman*, 449 F.2d 623 (7th Cir. 1971), petitioners contended that the Internal Revenue Service was required promptly to sell the accounts receivable pursuant to Section 6335(b) of the Internal Revenue Code. Because the Service did not sell the accounts

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[2] The jury ruled in favor of Evelyn Cash, however, for the first three of the five quarters at issue. Pet. App. A13.

receivable, petitioners claimed that they are entitled to a credit equal to the face amount of the accounts receivable on the date of the levy. Petitioners further claimed that the Service's failure to credit the face amount of the accounts against LTS's tax liability violated the Takings Clause of the Fifth Amendment to the United States Constitution. Pet. App. A21-A22.

The court of appeals affirmed the district court's decision. The court held that Section 6335(b) does not require the Internal Revenue Service to sell all the property it obtains by levy, but simply sets forth the procedures the Service must follow when it *does* sell such property (Pet. App. A23). The court explained that the statutory provisions regarding liens and levies "indicate that the Secretary has discretion over the decision to sell" (*ibid.*). "[B]ecause the IRS has no duty to sell levied upon accounts receivable, the taxpayer is not automatically entitled to full credit against his tax deficiency for the face value (or net value) of the account seized." *Id.* at A25-A26.

The court of appeals also rejected petitioners' contention that, by failing affirmatively to take action to sell the accounts receivable, the government took their property without compensation in violation of the Fifth Amendment. The court "decline[d] to hold as a matter of law that every time the IRS levies upon and seizes records of accounts receivable it has dominion and control over the asset that entitles the taxpayer to a credit for the value of the receivables at the time of the levy. The fact of the levy does not shift the collection risk to the government." Pet. App. A31. The court distinguished *United States* v. *Pittman*, 449 F.2d at 625, where the government levied upon rental real property, rented the property and allowed it to deteriorate. The court ob-

served that, unlike the situation found in *Pittman*, there was no evidence in this case to indicate that the Internal Revenue Service's action (or inaction) affected the value of the accounts receivable (Pet. App. A32-A33).

ARGUMENT

The court of appeals correctly held that LTS's accrued withholding tax liability was not satisfied by the Service's levy on the corporation's accounts receivable. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly rejected petitioners' argument that, under Section 6335(b) of the Code, the government must promptly sell the levied upon accounts receivable, or assume all risks of collection. Section 6335(b) does not require the Internal Revenue Service to sell all property obtained by levy. Instead, as the court of appeals correctly held (Pet. App. A23), the statute simply sets forth procedural requirements governing notice of a sale to the owner of the property and to the public when a sale *is* to be held. See 26 U.S.C. 6335(b).

Section 6331(b) of the Code states only that the Secretary "may" sell property that has been seized upon levy. 26 U.S.C. 6331(b). The use of the word "may" in the statute plainly confers discretion on the Secretary. See *United States* v. *Rodgers*, 461 U.S. 677 (1983).[3] Even

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[3] Courts consistently have held that, when (as in this case) the Service levies on a debt, the Service may collect the debt directly from the party upon whom the notice of levy was served rather than conducting a sale. *United States* v. *Rochelle*, 363 F.2d 225, 228 (5th Cir. 1966); *United States* v. *Sullivan*, 333 F.2d 100, 120 n.39 (3d Cir. 1964); *Field* v. *United States*, 263 F.2d 758, 763 (5th Cir.), cert. denied, 360 U.S. 918 (1959); *In re Cherry Valley Homes*,

when the owner of the seized property requests that it be sold, Section 6335(f) specifically grants the Secretary discretion to decline to do so if the sale "would not be in the best interests of the United States" (26 U.S.C. 6335(f)).

Economic realities support Congress's conclusion that a sale should not be required after every levy. When the government levies upon a debt—such as a bank account or an account receivable—it is often counter-productive to conduct a sale of the account. The purchaser of the account necessarily would discount its face value in order to realize a profit and to take into account the risks of collection. The expenses of holding the sale would further reduce the net amount realized. The value realized by sale of the taxpayer's accounts may thereby be significantly reduced. Congress thus left it to the discretion of the Service in each individual case whether to sell or attempt direct collection of the accounts levied. See note 3, *supra*.

2. Contrary to petitioners' contention (Pet. 7-16), the decision in this case does not conflict with *In re Barlow's, Inc.* and *United States* v. *Pittman*.

a. In *In re Barlow's, Inc.*, the government levied upon the taxpayer's account receivable and entered into an agreement with the account debtor that required installment payments of the debt. After making a few of the payments, the account debtor defaulted. The government did not then institute suit to enforce the agreement. The taxpayer contended that, in these circumstances, its tax liability should be reduced by the full

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Inc., 255 F.2d 706, 707 (3d Cir.), cert. denied, 358 U.S. 864 (1958). Cf. *United States* v. *National Bank of Commerce*, 472 U.S. 713 (1985).

face value of the accounts receivable and not the amount actually collected.

The district court agreed with the taxpayer. The court found it crucial that the IRS went "far beyond a mere levy on the property," and that, after entering into a payment agreement with the account debtor, the Service did not upon default seek to enforce that agreement. 53 Bankr. at 989. The court of appeals affirmed "based on these unique facts." 767 F.2d at 1100.

The "unique" facts presented in *In re Barlow's, Inc.*, are not present here. As the court of appeals observed (Pet. App. A31), there was no payment agreement in this case and the Service did not in any manner contribute to the failure of the corporation's account debtors to pay over the amounts owing to the corporation.

b. The decision in *United States* v. *Pittman*, is also inapposite. In *Pittman*, the Service levied upon certain rental property and obtained a quit-claim deed. The Service then insured the property and solicited tenants. Notices of levy were served on the tenants, notifying them that they should pay their rent to the government. Following the levy, the property deteriorated, and the government sought to collect the remaining tax deficiency from the taxpayer. The court of appeals held that, when the government "compels transfer of legal title to itself and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself," and the property thereafter deteriorates, the taxpayer is entitled to credit for the full fair market value of the property as of the date of the levy. 449 F.2d at 627. The court further observed in *Pittman*, however, that the government has no duty to sell accounts receivable obtained by levy, and may instead require the account debtor to make payment "directly to the Govern-

ment." *Ibid.* The decision in *Pittman* thus plainly does not conflict with the decision in this case.

3. Petitioners contend (Pet. 17-23) that the Service's actions in this case effected a taking of their property without just compensation. A seizure of property toward satisfaction of outstanding tax liabilities is not a seizure without just compensation. No court has accepted petitioners' contrary contention.

The vast majority of taxpayers, of course, voluntarily pay their taxes and do not impose on the government the burden of selecting and liquidating particular assets for this purpose. Prior to the levies issued in this case, petitioners could have collected or sold the accounts receivable and—according to their version of the value of those accounts—thereby paid the corporation's tax liability. As the court of appeals noted (Pet. App. A34), petitioners were also free to redeem the accounts receivable after the levy under Section 6337 of the Code (26 U.S.C. 6337). Petitioners' failure or refusal to pay withholding taxes over to the government should not be a basis for shifting the risk of collection of the corporate accounts receivable onto the public fisc.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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